# Petition

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81-852

NO.

In The

# Supreme Court of the United States

OCTOBER TERM, 1981

WILLY'S GROCERY
*Petitioner,*

VS.

UNITED STATES OF AMERICA
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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**Questions Presented:**

1. Did Circuit Court err in holding that the District Court misinterpreted FS Instruction 744-9-III-B-4?

2. Did court err in not interpreting the patent ambiguity of FS Instruction 744-9-III-B-4 in favor of petitioner?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:**

The petitioner Willy's Grocery, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 30, 1981. The opinion of the Court of Appeals (Lumbard and Oakes, Circuit Judges; Lasker, District Judge, sitting by Designation) is unreported. There was a written opinion filed in connection with both the Circuit Court and District Court proceedings.

## Statement of Jurisdiction

The judgment and opinion of the Court of Appeals, sub nomine, *Willy's Grocery* v. *United States of America,* from which review is sought, was entered on July 30, 1981 with written opinion.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1).

## Statement of the Case

### I. The Proceedings

Nassa Sam is the sole proprietor of Willy's Grocery. On February 7, 1979, the Food and Nutrition Service (FNS) of the United States Department of Agriculture imposed a one year disqualification upon the petitioner. The disqualification was the result of violations of 7 U.S.C. section 2023 (b) (renumbered at 7 U.S.C. section 2024) committed by an employee of Willy's Grocery, William Sam. Willy's Grocery took an administrative appeal on February 12, 1979 which upheld the disqualification in an order dated July 31, 1979.

On August 8, 1979 petitioner filed suit in the United States District Court for the District of Connecticut pursuant to 7 U.S.C. 2023. On August 12, 1980, Judge Daly vacated the sanction imposed by the Secretary of Agriculture and remanded the case to the Secretary for a redetermination of the sanction, if any, that should be imposed. The Government appealed to the Second Circuit Court of Appeals which reversed the District Court decision on July 30, 1981. A petition for rehearing was filed by petitioner and denied on September 14, 1981. On September 18, 1981, petitioner filed a Motion for a Stay of Mandate Pending the filing of this petition for writ of certiorari.

### II Statutes and Regulations Involved

**1) 7 CFR 278.6**

(i) ...that: (A) It is the firm's policy to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages, in exchange for food coupons,

and the firm has engaged in such practices, or
(B) The firm bought coupons at discount, and
(ii) The firm was warned about the possibility that violations were occurring and of the possible consequences of violating the regulations. The regional office may disqualify a firm for one year, even though the firm was not warned about the possibility that violations were occurring, if the regional office finds that the firm has committed unusually serious violations of the kind described in (i)(A) or (B) of this subparagraph. (iii) The evidence shows that the firm's coupon redemptions for a specified period of time exceed its food sales for the same period of time.

**2) FS Instruction 744-9-III-B-4**

*Store Policy.* The complete store record shall be analyzed to determine if violating the program was store policy. At least one of the following factors has to be present before violations can be considered store policy":

a. Substantial participation by the owner, responsible member of his family, or the management in the violations,

b. Admissions by the owner, management, or clerks that instructions were given to violate the program.

c. Physical proof, such as written instructions from the owner or management indicating that violations were permitted as store policy,

d. A combination of violative evidence and previous compliance actions which shows that consistent violations continued despite a reasonable attempt by FNS personnel to correct the situation by making the owner or management aware that violations were probably occurring in the store, and

e. Any other evidence which shows that the owner or management had to be aware that violations were occurring and did nothing to stop them.

## III Statement of Facts

On May 16, 1978, William Sam, husband and employee of Nassa Sam, was charged in a two count indictment with illegally obtaining food coupons in violation of 7 U.S.C. section 2023 (b) (renumbered at 7 U.S.C. section 2024). Mr. Sam pleaded guilty to count two of the indictment on July 13, 1978 and was sentenced by the District Court on September 15, 1978. On motion of the government count one was dismissed. Based upon these criminal charges and other alleged violations of FNS regulations committed by Mr. Sam the FNS on February 7, 1979 disqualified Mrs. Sam's store, Willy's Grocery, from participation in the Food Stamp Program for one year. Willy's Grocery took an administrative appeal on February 12, 1979 which upheld the disqualification in an order dated July 31, 1979.

On August 8, 1979, petitioner filed suit in the United States District Court for the District of Connecticut pursuant to 7 U.S.C. section 2023. On August 12, 1980, following a trial 'de novo' Judge T. F. Gilroy Daly vacated the sanction imposed by the Secretary of Agriculture and remanded the case to the Secretary for a redetermination of the sanction, if any, that should be imposed. The government appealed to the Second Circuit Court of Appeals which reversed the District Court decision on July 30, 1981. A petition for rehearing was filed by petioner and was denied on September 14, 1981. On September 18, 1981, petitioner filed a Motion for a Say of Mandate pending the filing of this petition for writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### 1. Circuit Court Erred In Holding That The District Court Misinterpreted FS Instruction 744-9-III-B-4.

### A.

### FS Instruction requires a finding of owner or management knowledge or involvement in Food Stamp Violations

The Food Stamp Program is operated for the Secretary of the Department of Agriculture by the Food and Nutrition Service (FNS) under the Food Stamp Act of 1977, as amended, 7 U.S.C. section 2011, et seq., (Supp. III 1979), Publ. No. 95-113, 91 Stat 958 (September 29, 1977). Congress has authorized the Secretary to disqualify a retail food store from participation in the food stamp program "on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or any of the regulations issued pursuant to this chapter 7 U.S.C. 2020 (renumbered at 7 U.S.C. 2021). The appropriate disqualification and the basis for such disqualification is governed by 7 C.F.R. section 278-6 (1979). Imposition of a one year penalty in this case requires that the evidence show:

> (i) ...that: (A) It is the firm's policy to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages, in exchange for food coupons, and the firm has engaged in such practices, or
> (B) The firm bought coupons at discount, and
> (ii) The firm was warned about the possibility that violations were occurring and of the possible consequences of violating the regulations. The regional office may disqualify a firm for one year, even though the firm was not warned about the possibility that violations were occurring, if the regional office finds that the firm has committed unusually serious violations of the kind described in (i)(A) or (B) of this subparagraph. (iii) The evidence shows that the firm's coupon

redemptions for a specified period of time exceed its food sales for the same period of time.

FNS has promulgated an internal guideline which provides the standards for administrative personnel to utilize in determining the length and basis for a particular disqualification. "Store" or "firm" policy" is defined by FNS in FNS (FS) Instruction 744-9 entitled "Food Stamp Program Criteria for Final Determination in OIG (Office of Inspector General) cases." The instruction reads as follows:

> *Store Policy.* The complete case record shall be analyzed to determine if violating the program was store policy. At least one of the following factors has to be present before violations can be considered store policy":
>
> a. Substantial participation by the owner, responsible member of his family, or the management in the violations,
>
> b. Admissions by the owner, management, or clerks that instructions were given to violate the program,
>
> c. Physical proof, such as written instructions from the owner or management indicating that violations were permitted as store policy,
>
> d. A combination of violative evidence and previous compliance actions which shows that consistent violations continued despite a reasonable attempt by FNS personnel to correct the situation by making the owner or management aware that violations were probably occurring in the store, and
>
> e. Any other evidence which shows that the owner or management had to be aware that violations were occurring and did nothing to stop them.

The question at issue is whether FS Instruction 744-9 requires that subsection "a" through "d" be read in conjunction with subsection "e." The interpretation of this instruction has led to conflict among the Circuits.

The petitioner is in agreement with the Tenth Circuit Court of Appeals which has held that in the case of small retail grocery subsection "e" must be proven before the store is held liable for punitive sanctions. See *Badwan* v. *United States,* 541 F.2d 1388 (10th Cir. 1976); But cf. *J.C.B. Supermarkets Inc.* v. *United States,* 530 F2d 1119 (2nd Cir. 1976).

In *Badwan,* a food store following an administration proceeding was disqualified for a period of one year from participation in the Food Stamp Program. In the trial de novo, the District Court for the District of Colorado affirmed the Administrative finding and the owner of the store appealed.

The factual setting of *Badwan* closely parallels the facts of this case even to the illegal acts of a responsible relative. The store owner's cousin, the operating manager illegally purchased food stamps from an agent of the Department of Agriculture. Based upon these violations, FNS disqualified the store from the Food Stamp Program holding that the employee's actions were sufficient to satisfy the "store policy" requirement of 7 C.F.R. 278-6 and FS Instruction 744-9. On appeal the Circuit Court found that the operating manager, with criminal intent and for his own advantage and to the disadvantage and determent of the owner illegally purchased food stamps. Based upon this factual finding, Chief Judge Lewis overturned the one year disqualification and ordered judgment entered in favor of the Plaintiff. The Court held that the store owner could not be held responsible for the criminal frolic of employees and the store could not be disqualified from the Food Stamp Program absent a finding of owner involvement in or knowledge of violations. In other words, subsection "e" of FS Instruction 744-9 must be present for a finding of store policy.

The Court stated:

> We recognize the administration of the Food Stamp Program is inherently difficult, that the program's worthy purpose can easily be thwarted by fraud or even a level of a much lesser degree of noncompliance,

> and that punitive sanctions are necessary for enforcement. However, the coin has two sides and courts should not abandon their traditional function of giving very close scrutiny to situations involving the tortious or criminal actions of employees nor to readily infer agency as a premise for imposing sanctions in such cases. Restatement (Second) of Agency section 34, comment g (1958) *Badwan* at 1390.

Furthermore, as the District Court noted in the instant case the obvious rational for imputing to a store the actions of its employees is to avoid a large corporate entity shielding itself from liability by claiming that it knew nothing of the violation engaged in by its employee, and should, therefore, not be penalized. This rational was upheld in *J.C.B. Supermarkets, Inc.*, supra. There the Court stated:

> "(O)bviously, the corporate entity here can only act through it agents.... If the fact that (employees) were not authorized to make illegal sales would exculpate the employer, it would be practically impossible to impose any penalties under the statute." Id. at 1122. See also *Marbro Foods, Inc.* v. *United States,* 293 F. Supp. 754 (N.D. Ill. 1968).

The petitioner concedes that in the case of the large corporate entity one must look beyond the principal's lack of knowledge and allow the imputation of the agent's action to it. However, the case of the large corporate entity present in *J.C.B. Supermarkets, Inc.* and the local retail grocer present in this case are quite distinct from one another. The District Court noted that to impute the acts of an employee to the owner of a family run operation would lead to same kind of inequity faced by the Department of Agriculture in trying to enforce the Food Stamp Regulations against large retail food chains. Petitioner agrees.

As stated in *Fort* v. *White,* 530 F.2d 1113 (2nd Cir. 1976) a principal, having no knowledge nor depriving any benefit from the wrongdoing of an employee cannot be caused to suffer from

punitive sanctions based upon that wrongdoing. Again in *Williams* v. *New York City,* 508 F.2d 356 (2nd Cir. 1974) the court stated:

> "The employer himself must be shown to have acted or failed to act to prevent known or wilfully disregard actions of his employee to be liable for punitive damage."

This line of reasoning led the District Court to find that the criminal frolic of William Sam, which, the evidence showed, in no way benefited the petitioner could not be the basis of the one year disqualification absent a finding of owner involvement or knowledge.

> "Where the owner of a 'mom and pop' type operation is present for fifty to sixty hours per week and must necessarily delegate some responsibility to one other employee, the actions of that employee cannot be deemed to reflect 'store policy' absent evidence that the owner either knew or should have known of the alleged violation (District Court, Memo of Decision, August 13, 1981 page 6.)."

The District Court having considered the lack of any prior warnings by FNS and the few violations alleged to have occurred within a five day period and giving appropriate weight to the credibility of the witnesses found no reliable evidence that Nassa Sam, sole proprietor of Willy's Grocery "had to be aware that the violations were occurring and did nothing to stop them." (See FS Instruction 744-9 IV-B-1 which states the evidence must clearly show that the retailer, as a matter of store policy, engaged in violations....")

The petitioner respectfully submits that based upon the foregoing and the fact that the trial court noted the absence of any participation, knowledge or reason for suspicion on the part of Nassa Sam that violations were occurring precludes the application of a one year disqualification period.

**B.**

**FS Instruction 744-9 Is Ambiguous And Unclear And Should Be Interpreted In Favor Of Petitioner**

It is clear that FS Instruction 744-9-III-B-4 is ambiguous and should be interpreted in favor of the petitioner. It is the ambiguous nature of this guideline which led the District Court and Circuit Court to differing interpretations. This ambiguity has also led to differing interpretations among the Circuit Courts (see *Badwan,* supra, but cf. *J.C.B. Supermarkets, Inc.,* supra). The petitioners assert that subsection "a" through "d" must be read in conjunction with subsection "e."

The Second Circuit and the District Court noted that the introductory paragraph of FS Instruction 744-9-III-B-4 states that "(A)t least one of the following factors (subsection a-e) has to be present before violation can be considered store policy." It is conceded that this language is clear enough. However, the petitioner asserts that the use of the conjunction "and" following subjunction "d" renders the regulation ambiguous and in fact mandates that subjunction "e" be present in all cases in addition to one of the preceding subsections. District Court Judge Daly agreed with this reading of FS Instruction 744-9 and stated:

> Therefore, for purposes of this case the actions of William Sam can be deemed to reflect "store policy" only if there were "(s)ubstantial participation by the owner, responsible members of her family, or the management in the violation...and...(a)ny other evidence which showed that the owner or management has to be aware that violations were occurring and did nothing to stop them." (District Court Memo of Decision (Aug. 13, 1980).

The words "or" and "and" in a regulation are generally not treated as interchangeable and their ordinary meaning should be followed if it does not render the sense of the regulation

dubious, but such words may be construed as interchangeable when necessary to effect the obvious intention of Congress. 82 C.J.S., *Statutes,* section 335 (1953). Congressional intent is clear.

The Food Stamp Program was created to "...permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." The normal channel of trade envisioned by Congress is the retail grocer. 7 C.F.R. 270-1 (a). For the Circuit Court to interpret FS Instruction 744-9 as it did unjustly penalizes the petitioner for acts which were neither known or engaged in by the petitioner. In addition to so interpret FS Instruction 744-9 as not requiring owner or management knowledge of the violation thwarts the express intent of Congress in creating the Food Stamp Program. To disqualify a grocery retailer without a finding that the owner or management was aware that violations were occurring is contrary to the legislative intent of providing a retail outlet for the redemption of Food Stamps and works an injustice both upon the innocent retailer and the ghetto community she serves. It is submitted that, although government has a legitimate interest in an efficiently run program such an interest should not be the bases of punitive sanctions against the petitioner.

## CONCLUSION

The issues presented herein have led to conflicting interpretations among the Federal Circuit Courts and should be decided by the Circuit.

The writ of certiorari should be granted.

Wherefore, the petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that Court herein, being the case numbered and entitled in its Docket No. 80-6215 *"Willy's Grocery* v. *United States"* and that the Judgment of that Court be reviewed as this Court may deem proper.

Dated the 19th day of October, 1981.

Willy's Grocery
Petitioner

By /s/Howard T. Owens Jr. Esq.
Howard T. Owens Jr. Esq.
Attorney for Petitioner

Owens & Schine
With him on the Petition

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1523—September Term, 1980

(Argued June 5, 1981 Decided July 30, 1981)

Docket No. 80-6215

WILLY'S GROCERY,

*Plaintiff-Appellee,*

—v.—

UNITED STATES OF AMERICA,

*Defendant-Appellant.*

Before:

LUMBARD and OAKES, *Circuit Judges,*
and LASKER, *District Judge.**

Appeal from a decision of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, *Judge,* which vacated a sanction imposed by the Secretary of Agriculture on a retail food store that had committed food stamp violations. Held that the sanction was in accordance with the Secretary's

**Of the Southern District of New York, sitting by designation.*

own regulations and guidelines, and therefore was not arbitrary or capricious.

TERRENCE G. JACKSON, Office of General Counsel (Raymond W. Fullerton, Associate General Counsel, United States Department of Agriculture, Washington, D.C., Richard Blumenthal, United States Attorney for the District of Connecticut, Hugh W. Cuthbertson, Assistant United States Attorney, New Haven, Connecticut, of counsel), *for Defendant-Appellant.*

HOWARD T. OWENS, JR., Owens & Schine, Bridgeport, Connecticut, *for Plaintiff-Appellee.*

OAKES, *Circuit Judge:*

The United States appeals from a decision of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, Judge, holding that a sanction imposed by the Secretary of Agriculture against Willy's Grocery for food stamp violations was improper under the Secretary's own guidelines. We believe that the district court misread the guidelines and that they were properly applied by the Secretary.

Willy's Grocery is a small retail food store in Bridgeport, Connecticut, many of whose customers use the food stamp program. The store is essentially a family-run operation: although Mrs. Nassa Sam owns it, her husband, Mr. William Sam, opens the store every morning, usually closes it at night, is authorized to sign checks for the store, waits on customers, and purchases new inventory. Mr. Sam does not draw a salary; he simply shares in the revenue earned by the store.

In 1975 the Food and Nutrition Service of the Department of Agriculture (FNS) authorized Mrs. Sam to participate in the federal food stamp program. Food stamps are issued to qualified households and may be redeemed at approved wholesale and retail outlets for eligible food purchases. 7 U.S.C. § 2103(a); *see id.* §§ 2014, 2015. The Government pays stores that partici-

pate in the program the full face value of all stamps accepted by the store. *Id.* § 2013(a); *see id.* § 2019. The statute provides for criminal penalties for persons knowingly misusing food stamps, *id.* § 2024, and the Secretary is authorized to disqualify stores from participation in the program for violations of the statute or regulations issued under it, *id.* § 2021. The period of disqualification is as provided by the Secretary by regulation. *Id.* Under the regulation applicable to this case, 7 C.F.R. § 272.6(a) (1978) (current version at 7 C.F.R. § 278.6(a) (1980), a retail food store that fails to comply with the statute may be disqualified from further participation in the food stamp program for a reasonable period of time, not to exceed three years. The FNS has also issued advisory guidelines to clarify the application of the regulations in specific cases.

This case arises out of food stamp violations committed by William Sam in April 1977, specifically, accepting food stamps for purchases including ineligible non-food items, returning cash as change in amounts exceeding that allowed by regulation, and, most significantly, first buying $100 worth of food stamps at a discounted price and later buying $500 worth of food stamps for $250. William Sam ultimately pleaded guilty to one count of discounting food stamps and was sentenced to a one-year suspended sentence and placed on probation for two years. After the criminal proceeding, FNS brought an administrative disqualification action against the store, and on February 7, 1979, the FNS regional office ordered the store disqualified from participation in the food stamp program for a period of one year, a decision that was affirmed by an FNS review officer on July 31, 1979.

Willy's Grocery sought review by the district court, pursuant to 7 U.S.C. § 2023, claiming that the sanction was "arbitrary and capricious" because the violations had not been committed by the owner of the store. In a decision rendered on August 12, 1980, the district court held that the sanction was unlawful because, in the court's view, the violations could not be considered "store policy" and thus were not in accord with the FNS guidelines, specifically FNS Instruction 744-9. The district

court therefore remanded the case to the Secretary for a redetermination of the sanction, if any, that should be imposed.

The standard of review for the imposition of a sanction is a determination whether the Secretary's action was arbitrary or capricious, *i.e.*, whether it was "unwarranted in law or without justification in fact." *Cross* v. *United States,* 512 F.2d 1212, 1218 (4th Cir. 1975) (en banc); *see Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182, 185-86 (1973); *Kulkin* v. *Berglund,* 626 F.2d 181, 184-85 (1st Cir. 1980); *Studt* v. *United States,* 607 F.2d 1216, 1218 (8th Cir. 1979) (per curiam); *Goodman* v. *United States,* 518 F.2d 505, 511-12 (5th Cir. 1975). Because we find that the agency properly applied its own regulations and guidelines to the food stamp violations committed by Willy's Grocery, we reverse.

Paragraph IV-B-1-a of FNS instruction 744-9 provides for a one-year disqualification when the retailer, "as a matter of store policy," is engaged in the discounting of food stamp coupons for cash. And paragraph III-B-4 explains how to determine whether a food stamp violation was committed as a matter of store policy:

> The complete case record shall be analyzed to determine if violating the program was store policy. *At least one of the following factors has to be present* before violations can be considered store policy:
>
> a. Substantial participation by the owner, responsible members of his family, or the management in the violations,
>
> b. Admissions by the owner, management, or clerks that instructions were given to violate the program.
>
> c. Physical proof, such as written instructions from the owner or management, indicating that violations were permitted as store policy.

> d. A combination of violative evidence and previous compliance action which shows that consistent violations continued despite a reasonable attempt by FNS personnel to correct the situation by making the owner or management aware that violations were probably occurring in the store, and
>
> e. Any other evidence which shows that the owner or management had to be aware the violations were occurring and did nothing to stop them.

(Emphasis added.) The district court read the store policy guidelines as requiring that subsection (e) be present in each case, apparently in addition to one of the factors listed in subsections (a) through (d). We believe that this interpretation of the FNS guidelines was erroneous. Subsections (a) through (e) list five separate methods by which store policy may be found; subsection (e) is merely a catchall provision. In this case, therefore, it was not arbitrary or capricious for the Secretary to find that Willy's Grocery was engaged in discounting coupons for cash as a matter of store policy, since the factor in subsection (a) was present; there was clearly "substantial participation" in the violation by a responsible member of the owner's family, namely William Sam. Thus the FNS's action was directly pursuant to its own guidelines.

Accordingly, the judgment of the district court is reversed.

# Appendix

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# Supreme Court of the United States

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UNITED STATES OF AMERICA
*Respondent.*

## SUPPLEMENTAL APPENDIX

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**DISTRICT OF CONNECTICUT**

| | | |
|---|---|---|
| WILLY'S GROCERY, Plaintiff, | : | |
| —vs— | : | CIVIL NO. B-79-327 |
| UNITED STATES OF AMERICA, Defendant. | : | |

## MEMORANDUM OF DECISION

Willy's Grocery (the store) is a small retail food store in Bridgeport, Connecticut serving a low-income urban community. The store is owned by Mrs. Nassa Sam. (PX 3). Working with her is her husband, William Sam, and a part-time stock boy. In 1975 Mrs. Sam was authorized by the defendant, Food and Nutrition Service of the Department of Agriculture (FNS), to participate in the Federal Food Stamp Program.

On April 7, 1977, John L. Jones, a special agent in the Department of Agriculture's Office of Investigation, visited the store in an undercover capacity. On that date William Sam accepted $5.00 in food coupons in exchange for merchandise which included two nonfood items in violation of 7 C.F.R. § 272.2(b)(1978)(recodified at 7 C.F.R. § 278.2(a)(1979)).[1] On this same date William Sam, in transactions involving food coupons, returned $.50, $.60 and $.39 in cash as change in

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[1] 7 C.F.R. § 272.2(b)(1978) states in relevant part that:

> "(b) Coupons shall be accepted by an authorized retail food store or meal service only in exchange for eligible food as defined in § 270.2(s) of this sub-chapter,...."

violation of 7 C.F.R. § 272.2(e)(1978)(amended and recodified at 7 C.F.R. § 278.2(a)(1979)).[2]

On April 8, 1977 Agent Jones returned to the store and again purchased from William Sam nonfood items using a $5.00 coupon and William Sam bought $100.00 in food coupons from Agent Jones at a discounted price, all in violation of FNS regulations. See note 1, *infra*. The final incident which is the subject of this review[3] occurred on April 12, 1977 when Agent Jones sold William Sam $500.00 in food coupons for $250.00 in cash.[4]

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[2]7 C.F.R. § 272.2(e)(1978) states in relevant part that "change in cash shall not be given for coupons." As amended and recodified at 7 C.F.R. § 278.2(d)(1979) the regulation states that "[i]f change in an amount of less than 1-dollar is required the eligible household shall receive the change in cash."

[3]See 7 U.S.C. § 2022(c)(1964), *renumbered* at 7 U.S.C. § 2023 (1977). Future reference to this section shall use § 2022 since it was in force at the time of the alleged violations.

[4]The unusual circumstances surrounding this transaction merit attention. As will all the alleged violations the only store member involved was William Sam. The credible evidence presented by both parties shows that the person responsible for the purchase of the food coupons on this occasion was one Michael Mahigel. (See Def. Ex. 506 & Tr. at 22-26, Oct. 30, 1979). William Sam worked in a similar store owned by Mahigel for a short period following his layoff as a foreman with Avco Lycoming Co. After Sam began working in his wife's store he remained friendly with Mahigel, much to the chagrin of Mrs. Sam. Mrs. Sam repeatedly requested her husband not to have Mahigel hang about the premises. On April 12, 1977 Mahigel was standing behind the counter when Agent Jones offered $500.00 worth of stamps to Sam. Sam told Jones that Mahigel was his cousin, that it was his store and he was the boss, and that he (Mahigel) would give him (Jones) $250.00 for the stamps. It was apparently Mahigel who gave Sam the $250.00 which was immediately given to Jones. The stamps went from Jones to Sam to Mahigel. Unlike the coupons discounted in the April 8, 1977 incident, the Government made no attempt to trace

On May 16, 1978 William Sam was charged in a two-count indictment with illegally obtaining food coupons in violation of 7 U.S.C. § 2023(b)(renumbered at 7 U.S.C. § 2024).[5] Mr. Sam pleaded guilty to count two of the indictment[6] on July 13, 1978 and was sentenced by this Court on September 15, 1978. On motion of the Government count one was dismissed. Based on the two incidents which were the subject of the indictment against Mr. Sam and the other alleged violations of FNS regulations committed by Mr. Sam noted above, the FNS, on February 7, 1979 disqualified Mrs. Sam's store from participation in the food stamp program for one year. Mrs. Sam took an administrative appeal on February 12, 1979 which upheld the disqualification.

Plaintiff filed this action pursuant to 7 U.S.C. § 2022(c), see note 3, *infra,* providing for *de novo* review in a federal district court of "the validity of the administrative action." A stay of the disqualification order was granted absent objection by Magistrate Arthur H. Latimer on August 29, 1979, pending disposition of this case.

The determinative issue in this case does not require the Court to enter the debate on whether an FNS sanction is subject to judicial review under 7 U.S.C. § 2022(c). That issue was reserved by the Second Circuit in *J.C.B. Super Markets, Inc. v. United States,* 530 F.2d 1119, 1123 (2d Cir. 1976), but has been ruled on in this District, *Teodoro Martinez, Co-*

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these coupons through the Federal Reserve Bank in Boston, MA to determine their place of redemption. (Gov't. Post-Trial Memorandum filed Jan. 28, 1980 at 3). Criminal charges were never brought against Mr. Mahigel.

[5] "(b) Whoever knowingly . . . acquires . . . coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall . . . be guilty of a felony . . ."

[6] Count two related to the April 12, 1977 purchase of $500.00 worth of coupons for $250.00 in cash. (PX 6).

*Owner d/b/a Barranquitta's Market v. United States,* No. H-75-13, slip op. (D. Conn. July 23, 1979)(Blumenfeld, J.) (concluding "that § 2022(c) provides for review of the validity of the sanction as well as the underlying violation...." *Id.* at 5). Other Circuits are split on the question.[7] For the reasons stated below this Court finds that the disqualification imposed in this case was *per se* improper under the applicable regulations and FNS internal guidelines.

7 U.S.C. § 2020 (renumbered at 7 U.S.C. § 2021) authorizes disqualification of a retail food store from participation in the food stamp program "on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or of the regulations issued pursuant to this chapter." The appropriate disqualification period and the basis for such disqualification is governed by 7 C.F.R. § 278.6 (1979). Imposition of a one year penalty in this case requires that the evidence show:

> (i)...that: (A) It is the firm's policy to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages, in exchange for food coupons, and the firm has engaged in such practices, or
>
> (B) The firm bought coupons at discount, and
>
> (ii) The firm was warned about the possibility that violations were occurring and of the possible consequences of violating the regulations. The regional office may disqualify a firm for 1 year even though the firm was not warned about the possibility that

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[7] *Compare* Martin v. United States, 459 F.2d 300 (6th Cir.), *cert. denied,* 409 U.S. 878 (1972) and Save More of Gary, Inc. v. United States, 442 F.2d 36 (7th Cir.), *cert. dismissed,* 404 U.S. 987 (1971) (declining review of the sanction) with Studt v. United States, 607 F.2d 1216 (8th Cir. 1979), Goodman v. United States, 518 F.2d 505 (5th Cir. 1975) and Cross v. United States, 512 F.2d 1212 (4th Cir. 1975)(*en banc*)(ordering review of the santion).

violations were occurring, if the regional office finds that the firm has committed unusually serious violations of the kind described in (i)(A) or (B) of this subparagraph. (iii) The evidence shows that the firm's coupon redemptions for a specified period of time exceed its food sales for the same period of time. *See also* note 8, *infra.*

"Store" or "firm policy" is defined by the Food Stamp Division of the United States Department of Agriculture in FNS (FS) Instruction 744-9 entitled "Food Stamp Program Criteria for Final Determinations in OIG [Office of the Inspector General] Cases." (Def. Ex. 505). The Manual states as follows:

> *Store Policy.* The complete case record shall be analyzed to determine if violating the program was store policy. At least one of the following factors has to be present before violations can be considered store policy:
>
> a Substantial participation by the owner, responsible member of his family, or the management in the violations,
>
> b Admissions by the owner, management, or clerks that instructions were given to violate the program,
>
> c Physical proof, such as written instructions from the owner or management, indicating that violations were permitted as store policy,
>
> d A combination of violative evidence and previous compliance actions which shows that consistent violations continued dispite a reasonable attempt by FNS personnel to correct the situation by making the owner or management aware that violations were probably occurring in the store, and

> e Any other evidence which shows that the owner or management had to be aware that violations were occurring and did nothing to stop them.

Subsections "a" through "d" must be read in conjunction with subsection "e". Therefore, for purposes of this case the actions of William Sam can be deemed to reflect "store policy" only if there was "[s]ubstantial participation by the owner, responsible members of his family, or the management in the violations, . . . and . . . [a]ny other evidence which shows that the owner or management had to be aware that violations were occurring and did nothing to stop them."

*Substantial participation by the owner*—Willy's Grocery had never been cited for violations or suspected violations prior to these incidents. Excluding the chivalrous testimony of William Sam all other credible evidence indicated that Mrs. Sam was never aware of the improprieties which formed the basis for her store's disqualifications until she read of her husband's indictment in the newspaper.

*Responsible family member*—Though William Sam did not act in a responsible manner, the Court finds that the term "responsible", as used in the Manual, means a family member of sufficient age and maturity.

*Management*—The obvious rationale for imputing to the store the actions of its management is to avoid a large corporate entity shielding itself from liability by claiming that it knew nothing of the violations of its employee and should, therefore, not be penalized. Such an argument led this Circuit to hold that "[o]bviously, the corporate entity here can only act through its agents . . . . If the fact that [employees] were not authorized to make illegal sales would exculpate the employer, it would be practically impossible to impose any penalties under the statute." *J.C.B. Super Markets, Inc., supra,* at 1122. *See also Marbro Foods, Inc. v. United States,* 293 F. Supp. 754 (N.D. Ill. 1968). The defendant argues that this Court should adopt the same rationale to the "mom and

pop" operation involved here. Such an interpretation would lead to the same kind of inequity faced by the Department of Agriculture in trying to enforce the food stamp regulations against large retail food chains. Willy's Grocery is owned by Mrs. Nassa Sam. She is solely responsible for the store's operation. She handles all the bookkeeping and accounting. She is responsible for determining what will and will not be sold in the store, directs her husband on what needs to be ordered and is present in the store from fifty to sixty hours per week. Any store the size of Willy's Grocery must necessarily have an employee or employees capable of exercising "managerial" authority in the absence of the owner. All of the activities performed by William Sam as outlined in the Government's Trial Memorandum, filed Jan. 28, 1980, at 6-7 are typically required by a small neighborhood grocery store. The Court finds that the term "management" as used in the FNS Manual is not applicable to the facts of this case. Where the owner of a "mom and pop" type operation is present for fifty to sixty hours per week and must necessarily delegate some managerial responsibility to one other employee, the actions of that employee cannot be deemed to reflect "store policy" absent evidence that the owner either knew or should have known of the alleged misconduct.

*Awareness and Prevention*—Considering the lack of any prior warnings by FNS and the few violations alleged to have occurred within a five day period, and giving appropriate weight to the credibility of the witnesses, the Court finds no reliable evidence that Mrs. Sam "had to be aware that violations were occurring and did nothing to stop them."

Applying the preceeding discussion to the appropriate regulations, see text, *supra,* at 3, Court finds that the absence of any participation, knowledge or reason for suspicion on the part of Mrs. Sam that violations of the food stamp regu-

lations were occurring precludes application here of the one year disqualification penalty.[8]

It is accordingly the order of this Court that this case be remanded to the Secretary of Agriculture for a determination of an appropriate sanction, if any, against the store, taking into account the highly mitigating factors of this case, with the knowledge that no sanction may be imposed which requires as its predicate a finding of "store or firm policy" or participation or knowledge of "management" in the alleged violations.[9]

It is So Ordered.

Dated at Bridgeport, Connecticut this 12th day of August 1980.

/s/ T. R. Gilroy Daly

T.F. GILROY DALY
United States District Judge

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[8]The FNS Manual, def. Ex. 505, at 9-10, in effect at the time the sanction was imposed also prohibits imposition of a one year penalty absent clear evidence "that the retailer, as a matter of store policy,...engaged in violations..."as alleged in this case.

[9]Those mitigating factors which should be considered are, *inter alia,* (1) the percentage of plaintiff's customers that use food stamps (testimony of 75%), (2) the punishment already inflicted upon the responsible party (Mr. Sam), (3) the lack of any evidence of Mrs. Sam's knowledge or participation in the alleged violations, (4) the role of a third party in the most serious of the alleged violations and (5) the lack of any known misconduct either prior or subsequent to the incidents at issue.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of September, one thousand nine hundred and eighty-one

Present:

HON. EDWARD J. LUMBARD, CJ

HON. JAMES L. OAKES, CJ
Circuit Judges

HON. MORRIS E. LASKER, DJ
District Judge

WILLY'S GROCERY,
Plaintiff-Appellee

v. 80-6215

UNITED STATES OF AMERICA,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the — Appellee Willy's Grocery

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A DANIEL FUSARO
Clerk

by: /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk